United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1317

UNITED STATES OF AMERICA,
Appellee

v.

LLOYD DIXON, JR.,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

ISSUES PRESENTED

1. Whether the evidence was sufficient to sustain the defendant's conviction.

2. Whether it was proper for the trial court to instruct the jury that it could consider the defendant's position as president of the corporation in determining whether he had knowledge of the S.E.C. regulations imposing upon him the obligation to disclose his personal indebtedness to the corporation.

3. Whether the indictment properly charged both securities law and mail fraud violations.

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. 78n provides in pertinent part:

> (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78(l) of this title.
>
> * * *

17 C.F.R. 240.14a-3 provides in pertinent part:

> (a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with a written proxy statement containing the information specified in Schedule 14A (Sec. 240.14a-101).
>
> * * *

17 C.F.R. 240.14a-101 (Item 7e) provides in pertinent part:

> * * *
>
> (e) State as to each of the following persons who was indebted to the issuer or its subsidiaries at any time since the beginning of the last fiscal year of the issuer, (i) the largest aggregate amount of indebtedness outstanding at any time during such period, (ii) the nature of the indebtedness and of the

transaction in which it was incurred, (iii) the amount thereof outstanding as of the latest practicable date, and (iv) the rate of interest paid or charged thereon:

(1) Each director or officer of the issuer;

(2) Each nominee for election as a director; and,

(3) Each associate of any such director, officer or nominee.

Instructions. 1. Include the name of each person whose indebtedness is described and the nature of the relationship by reason of which the information is required to be given.

2. This paragraph does not apply to any person whose aggregate indebtedness did not exceed $10,000 or 1 percent of the issuer's total assets, whichever is less, at any time during the period specified. Exclude in the determination of the amount of indebtedness all amounts due from the particular person for purchases subject to usual trade terms, for ordinary travel and expense advances and for other transactions in the ordinary course of business.

15 U.S.C. 78m provides in pertinent part:

> (a) Every issuer of a security registered pursuant to Section 78(l) of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--
>
> (1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78(l) of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.
>
> (2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

* * *

17 C.F.R. 240.13a-1 provides in pertinent part:

> Every issuer having securities registered pursuant to section 12 of the act shall file an annual report for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Registrants on Form 8-B shall file an annual report for each fiscal year beginning on or after the

date as of which the succession occurred. The report shall be filed within 120 days after the close of the fiscal year or within such other period as may be specified in the appropriate form.

* * *

17 C.F.R. 210.5-04 provides in pertinent part:

* * *

Schedule II - Amounts due from directors, officers, and principal holders of equity securities other than affiliates. The schedule prescribed by Sec. 210.12-03 shall be filed with respect to each person among the directors, officers and principal holders of equity securities other than affiliates, from whom an aggregate indebtedness of more than $20,000 or 1 percent of total assets, whichever is less, is owed, or at any time during the period for which related profit and loss statements are filed, was owed. For the purposes of this schedule, exclude in the determination of the amount of indebtedness all amounts due from such persons for purchases subject to usual trade terms, for ordinary travel and expense advances and for other such items arising in the ordinary course of business.

* * *

17 C.F.R. 210.12-03 provides in pertinent part:

> Column A. Name of debtor.
> Column B. Balance receivable at beginning of period. 1/
> Column C. Additions.
> Column D. Deductions: (1) Amounts written off; (2) collections. 2/
> Column E. Balance receivable at close of period; (1) current; (2) not current.
>
> 1/ The balance at the beginning of the period of report may be as per the accounts.
> 2/ If collection was other than in cash, explain.

15 U.S.C. 78ff(1970) provided in pertinent part:

> (a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes,or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person

is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

18 U.S.C. 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Western District of New York (Curtin, J.), the appellant (hereinafter "defendant") was convicted on six counts charging conspirary, mail fraud, and securities law violations. He was sentenced to a one-year prison term on each of the six counts to be served concurrently, and received consecutive fines totalling $33,000.[1/]

1. Introduction

The prosecution arose out of defendant's activities as president of AVM Corporation of Jamestown, New York, a manufacturer of voting machines. Contrary to the defendant's characterization (Br. p. 1), the indictment charged false filings with the Securities and Exchange Commission (S.E.C.) as well as the mailing of false proxy statements. Specifically, count one charged conspiracy to violate certain securities laws [15 U.S.C. 78n, ff; 17 C.F.R. 240.14a-3 and 240.14a-101 (Item 7e)] and the federal mail fraud statute (18 U.S.C. 1341) by soliciting proxies with a proxy statement which failed to disclose the defendant's indebtedness to AVM.[2/] Count two charged the substantive offense of having violated securities law by soliciting proxies by means of an inaccurate proxy statement [15 U.S.C. 78n, ff; 17 C.F.R. 240.14a-3 and 240.14a-101

1/ The defendant was fined $10,000 each on counts one, two, and six, and $1,000 each on counts three, four, and five.

2/ Two other individuals, William Lewis and Kenneth Hammond, were named as unindicted co-conspirators.

(Item 7e)]. Counts three, four, and five charged substantive violations of the mail fraud statute (18 U.S.C. 1341), averring that the defendant, having devised a scheme to defraud, had on three occasions received and taken from the mails proxies falsely solicited. Finally, count six charged that the defendant had failed to include a "Schedule II" in AVM's annual report to the S.E.C. for 1970 (hereinafter the "10K report") which would have disclosed his indebtedness to the corporation, as required by 15 U.S.C. 78m, ff; 17 C.F.R. 210.5-04, 240.13a-1, 210.12-03.

As a preliminary matter, we note the requirements of the securities laws and regulations involved. Under 15 U.S.C. 78n (section 14 of the Securities Exchange Act of 1934, 48 Stat. 881, 895) it is unlawful to solicit shareholder proxies by use of the mails or other instrumentality of interstate commerce except as prescribed by the rules and regulations of the Securities and Exchange Commission. Under 17 C.F.R. 240.14a-3 and 240.14a-101 (Item 7e) each proxy solicitation must include the following information for each officer of a corporation whose aggregate debt to the corporation has exceeded $10,000 any time during the prior fiscal year:

(i) the largest aggregate amount of indebtedness outstanding at any time during such period,

(ii) the nature of the indebtedness and of the transaction in which it was incurred,

(iii) the amount thereof outstanding as of the latest practicable date, and

(iv) the rate of interest paid or charged thereon . . . .

Excluded from the computation of this debt are travel and other business expenses.

Pursuant to 15 U.S.C. 78m (section 13 of the Securities Exchange Act, 48 Stat. 881, 894), corporations such as AVM are required to file annual reports with the S.E.C. in accordance with S.E.C. rules and regulations. Pertinent S.E.C. regulations include a reporting obligation as to corporate officers' debts similar to that required in proxy solicitations. Specifically, 17 C.F.R. 210.5-04, 240.13a-1, and 210.12-03 mandate that a form denominated "Schedule II" be filed with the annual 10K report as to each corporate officer

> from whom an aggregate indebtedness of more than $20,000 . . . is owed, or at any time during the period for which related profit and loss statements are filed, was owed. (See 17 C.F.R. 210.5-04).

The Schedule II must include the name of the debtor, the balance receivable at the beginning of the relevant period, additions, deductions, and the balance receivable at the end of the period. See 17 C.F.R. 210.12-03.

2. The Defendant's Burgeoning Loans from AVM During 1970 [3/]

The defendant, as indicated above, was the president of AVM Corporation, a former subsidiary of Rockwell Manufacturing Company

3/ Within the brief "A" refers to the appendix filed by the defendant which contains the testimony of William Lewis and Robert Entwisle. "Tr" refers to the trial transcript, dated December 5, 1974.

which became an independent corporation through a spin-off by Rockwell in 1964. AVM registered with the Securities and Exchange Commission on April 28, 1965. (Government Exhibit 1; A 131,20)

As an officer of the corporation, the defendant was able to obtain loans from the company and accounts were established on the company records to reflect such advances. These loans were subject to the above discussed reporting requirements of the S.E.C. During 1970, the year at issue in this case, two accounts reflected the defendant's advances, Account No. 2510 (Government Exhibit 2) and Account No. 2512-02 (Government Exhibit 43). At the beginning of 1970, the defendant's 2510 account reflected that he owed the company $13,800 and the 2512-02 account reflected a debt of $4,068 (A 22-23, 41).

During 1970, the defendant increased his debt to the corporation by securing several advances which were reflected on his 2510 account (Government Exhibit 2). These were described by William Lewis, who in 1970 was Secretary-Treasurer of AVM and who testified under a grant of immunity (A 16). On January 29, 1970, the defendant asked Lewis, as treasurer, to have a check for $28,000 drawn up for himself and this loan was reflected on the 2510 account (A 23-25). On February 26, the defendant asked Lewis to have a check for $4,000 made out to himself and this transaction was also reflected on the 2510 account (A 26-27).

On April 2 and April 24, the defendant asked Lewis for checks for $3,000 and $10,000 respectively which were provided and which together

were reflected as a $13,000 debit on defendant's 2510 account (A 28-29). Finally, on May 15, defendant received a check for $5,000, which was also charged to the 2510 account (A 30-31). 4/

Thus, by the end of October 1970; the combined total of defendant's two accounts showed outstanding loans to him from the corporation of some $67,868. While, as the defendant notes (Br. p. 9-10), these AVM executive accounts occasionally reflected as well moneys advanced for business expenses, which expenses would be credited to the advances, it was established that the defendant's two accounts constituted purely personal loans obtained from the corporation. Lewis testified that the defendant did not use his accounts for business expenses; he would instead submit his expense accounts and be reimbursed in case for such expenditures (A 72-73). Moreover, pursuant to the annual audit of the corporation, the defendant signed, on November 30, 1970, a confirmation statement acknowledging his indebtedness to the company in the sum of $67,868.08 (Government Exhibit 79; A 40-41). In any event, while the Government contended at trial on the basis of this evidence that all advances on defendant's two accounts represented personal loans, it was agreed by the defendant in a stipulation that by October of 1970, the defendant's personal debt to the corporation was at least $65,368.08 (Government Exhibit 89; Tr 10).

4/ Also, on September 25, the defendant received a check for $6,500, but this was repaid to the corporation and credited in the 2510 account almost immediately (A 32-36). On October 21, the defendant received a check for $11,000, but this, too, was immediately repaid on October 21, October 22, and October 27, by checks of $3,000, $5,000 and $3,000, respectively, which were reflected on the 2510 account as $3,000 and $8,000 credits (A 36-39).

3. The Defendant's Paper Transactions

Given this sizeable outstanding loan, the defendant did not want to report its existence on the upcoming proxy statement which would be sent to shareholders prior to the 1971 annual meeting, or to the S.E.C. in the annual 10K report which AVM was required to file each year with the Commission (A 119-120). Accordingly, in December of 1970, he and Lewis generated several specious financial transactions which made it appear that his debt to AVM was significantly diminished by the end of 1970.

A. On about December 4, the defendant instructed Lewis to charge the $5,000 advance of May 15 and the $4,000 advance of February 26, to the executive account of his father, Lloyd Dixon, Sr. (A 43-46; Government Exhibit 32), even though he had, in the November 30th confirmation statement (Government Exhibit 79), acknowledged all the advances reflected in his 2512-02 and 2510 accounts (Government Exhibit 2, 43) to be his own. Lewis thereupon sent word to the accounting department that the $5,000 and $4,000 advances "should have been charged against W. Dixon, Sr. . . ." (Government Exhibit 30). Thus, a credit for this transfer was lodged in the defendant's 2510 account purporting to reduce his debt by $9,000.[5/]

5/ This transfer was recorded on the defendant's father's account and thus allegedly showed a debt owed by him of $19,000, although he, too, on November 30, had signed a confirmation statement indicating that his actual debt to the corporation was only $10,000 (Government Exhibit 79).

B. Next, the defendant purported to repay much of his remaining debt by the end of fiscal year 1970, with the intent of reobtaining these alleged repayments at the beginning of the new year. On December 28, the defendant provided a check for $30,000 (Government Exhibit 34) to the AVM Corporation to be credited to his 2510 account and this check was deposited in the AVM bank account on the same day (Government Exhibit 33). The actual credit to his 2510 account, however, was made five days earlier, on December 23 (see Government Exhibit 2; A 46-47).

C. Also on December 28, at the defendant's request, Lewis took an advance of $5,000 from the corporation in the form of a check for that amount. Lewis then had one of his employees cash the check at a bank and bring the proceeds to him. This cash was then deposited and credited to defendant's 2510 account. Defendant assured Lewis that this "loan" would be repaid very shortly (A 49-51, 57, Government Exhibits 36,37, 38, 39).

D. Finally, the defendant provided on December 31, a check to AVM for $4,768. This, if recognized on the company books for 1970, would have had the effect of reducing defendant's indebtedness to $19,100. To insure that the check, though presented the last day of the year, would be recorded in the books for that year, Lewis created a special journal entry denoted "cash in transit" to reflect defendant's $4,768 check (Government Exhibit 42, A 48-50). Of this amount, $700 was applied to defendant's 2510 account and the remaining $4,068 was used to fully pay off his 2510-02 account (A 49).

Thus, by the end of fiscal year 1970, the defendant's apparent outstanding debt to AVM was $19,100, of which the defendant by stipulation agreed at trial that $14,600 was a personal debt (Government Exhibit 89, Tr pp.13,11),and which the government's evidence showed was entirely a personal debt (see, infra,p. 12).

These purported repayments by the defendant, however, were only "paper" transactions. On February 1, 1971, the defendant had Lewis reobtain for him the $30,000 advance he had repaid on December 28 (Government Exhibit 50, A 54-55). On February 22, defendant ordered another $5,000 advance and this check was deposited in Lewis' account as repayment for his December 28 loan to defendant (Government Exhibit 52, A 55-56). Another $300 advance was taken by defendant on February 25, 1971 (Government Exhibit 57, 58, 59, A 57-58).[6/] By these repayments, the defendant by February 22, was officially indebted to AVM for $54,000, plus the $9,000 which remained, inaccurately, on his father's advance account.

4. The Defendant's Failure to Report His Outstanding Corporate Debt.

Even though the defendant's purported debt to the corporation was $19,100, at the end of fiscal year 1970, he was still required, under the SEC regulations discussed above, to report the full extent of his transactions with the corporation on both the opening proxy statement to be

6/ These three advances are reflected on defendant's 1971 2510 account (Government Exhibit 48) as a single $35,300 debit.

sent to shareholders and on the annual report filed with the S.E.C. for 1970. As explained above, under 15 U.S.C. 78(n) and accompanying regulations, such financial information is required to be disclosed in a proxy for each corporate officer whose debt exceeds $10,000, at any time during the past fiscal year; and under 15 U.S.C. 78(m) and its regulations, the information is required on an annual corporate 10K report filed with the S.E.C. for all officers from whom $20,000 ". . . is owed, or at any time during the period for which related profit and loss statements are filed, was owed." (emphasis added)

Appellant's defense at trial rested upon the contention that he understood S.E.C. disclosure rules to apply only if his debt exceeded $20,000, at the end of a fiscal year. The evidence showed, however, that he was in fact aware that there were two separate regulations neither of which were "year-end" requirements. Robert Entwisle, corporate counsel for AVM since 1964, testified that when AVM went public the S.E.C. sent the Company a complete set of its rules regulating the filing of annual reports and proxy statements (A 135). Entwisle discussed these requirements with both the defendant and Lewis and the three attended a seminar on the S.E.C. rules in the Spring of 1965 (A 135-36).[7/] The defendant and Entwisle attended a second seminar, a PLI

7/ The defendant refers to Entwisle's testimony that when AVM went public he discussed the S.E.C. requirements with Lewis and two auditors from AVM's accounting firm (Ernst & Ernst), and that the defendant was not present at this meeting (Br. at 13). However, immediately thereafter in his testimony, Entwisle indicated that he also discussed these requirements with the defendant (A 135-36).

conference, on S.E.C. disclosure requirements during the Spring of 1966; those who attended were given written materials on the subject, including a verbatim copy of Item 7e of 17 C.F.R. 240.14a-101, and the proxy rules were specifically discussed during the conference (A 136, 138-139).[8/]

In addition, co-conspirator Lewis admitted that possibly as early as 1968, AVM's Executive Vice President, Jack Lyons, had cautioned him that a Schedule II was required in the annual 10K if a particular officer's debt had exceeded $20,000 at any time during a fiscal year (A 114-116). Such information, Lewis testified, he usually passed on to the defendant (A 113).[9/] Thus, it was not as the defendant states (Br. at 14-15; 32), "undisputed" that Lewis and Lyons, the defendant's co-workers, believed the S.E.C. 10K rule to be a year-end requirement.

Having purportedly reduced his debt to $19,100, the defendant and Lewis determined to avoid these requirements by failing to disclose the Dixon loans to those in charge of preparing the proxy and annual statement. "We felt we - would rather not have it on the proxy statement" (A 119).

8/ The defendant points out (B. at 32) that this was a two day conference and that he and Entwisle attended only the first day. However, Entwisle testified that it was in this day that the proxy rules were discussed (A 139).

9/ Even though he was aware of the requirement, Lewis continued to submit to the S.E.C. annual 10K reports which did not contain a Schedule II (A115-116). The defendant refers to Lewis' testimony on cross-examination that Sam Hale, an accountant from Ernst and Ernst who handled AVM's account from 1964-1967, had at some point stated that for purpose of the 10K report, an officer's account only had to be below $20,000 by the end of the year (Br. p. 11-12). However, Lewis indicated that this information had been covered by Hale only in 1967 (A 89-91). As indicated above, the defendant and Lewis were later advised as to the correct requirements by Lyons in 1968 or 1969.

Entwisle, as general counsel, was responsible for preparing the initial drafts of each year's proxy statement which the defendant and Dixon were to supplement on their own review of the drafts by providing such information as personal loans obtained from the corporation (A 136-138). As Entwisle testified at trial:

> I framed the draft of the proxy statement, to the best of my ability, in such a way as it would bring forth full disclosure of anything and everything that the rules required, and the procedure for doing the proxy statement . . ., the practice was for me to prepare the first draft of the proxy statement based on such information as I had, and then submit it to Mr. Lewis with a copy to Mr. Dixon for input. The first draft had many, many blanks in it, blanks such as stock ownership, the stock option information, thrift ownership, the pension information, there was a paragraph always on transactions, and the practice was that with this draft in front of the officers, they were expected to give back to me full disclosure based on the rules. (A 137-138). (emphasis added)

This procedure for preparing the proxy was established when AVM first went public in 1964. Since the corporate officers were expected to provide such information, Entwisle himself did not personally examine the corporate accounts (A 155-157), contrary to the defendant's assertion that the attorney had at least constructive knowledge of the outstanding loans (Br. at 45) Entwisle did not finally learn of the loans unitl after a grand jury investigation of AVM had commenced (A 142).

For the Spring 1971 proxy the defendant failed to inform Entwisle of any loans outstanding to himself, even though he had acknowledged in the confirmation statement sent by Lewis in November that he at that time owed some $67,868 and even though on paper he still owed AVM $19,100 (A 138). It was established that the defendant had personally

reviewed Entiwsle's draft of the 1971 proxy, for the government introduced (Government Exhibit 77) a copy of that draft on which defendant's handwriting, making various comments about matters other than his loans, was identified. (L 58) [10/] (Lewis did provide Entiwsle with other information, other than the defendant's loans, which were called for by the proxy rules and which were included in the final proxy statement (A 141).

The final proxy statement and proxies for the April, 1971 meeting were prepared (Government Exhibit 71) without mention of defendant's indebtedness and were mailed to the stockholders. Relating to Counts 3, 4, and 5, charging mail fraud, it was stipulated that certain shareholders had received these proxy statements (Government Exhibit 72-75) and had signed the accompanying proxies and returned them to AVM in Jamestown (A 126-127). At the defendant's direction, Lewis received these proxies and tabulated them for the forthcoming shareholders meeting (A 69-70).

A similar procedure was used in the preparation of the annual 10K report. Entwisle prepared a draft of a narrative portion of the report,

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10/ We must thus dispute defendant's assertion that his "only connection" with the proxy statement was to indicate any change in the thrift plans or ownership by directors of AVM shares (Br. p. 14). Indeed, the defendant's comments written on the first draft of the proxy statement (Government Exhibit 77) include comments as to Entwisle's language under the section entitled "Information As to Nominees for Directors" and a question as to whether mention of an annuity purchased by Pockwell for himself need be mentioned. Entwisle's own testimony (See infra. p.18)reveals that the defendant was specifically expected, pursuant to the procedures established in 1964 ,to provide relevant information, such as his outstanding loans, which were required by the S.E.C. rules which had been explained to him.

which was sent to Dixon, Lewis, Lyons,and his assistant Kenneth Hammond[11] for comment and review (A 131-133). The second portion of the report, which included the financial report and schedules, was prepared but without the Schedule II report, and then filed. for review (A 133, 85, 92-93). Like the proxy statements, the 10K report for 1970 (Government Exhibit 70), which was filed with the S.E.C. on March 31, 1971, failed to disclose defendant's indebtedness through the inclusion of the Schedule II.

The defendant's scheme did not become apparent until late 1972 when a grand jury, investigating possible bribery of municipal employees in connection with the purchase of voting machines, called Lewis before it. Entwisle began to suspect, on speaking with Lewis after his grand jury testimony, that defendant may have had loans from the corporation which had been unlawfully concealed and, accordingly, he personally examined the books of the company (A 142-144, 157). Under the direction of the board of directors, a special report was then sent to the corporation's shareholders and an 8K report was sent to the S.E.C. in late 1972 disclosing defendant's loan.[12]

11/ Hammond, the defendant's co-conspirator, worked closely with Lyons (A 132).

12/ The defendant attributes the exculpatory conclusion of "misunderstanding" in these reports to a "full and independent investigation" by an independent law firm. AVM counsel Entwisle prepared both of these reports, assisted by Wilmer, Cutler & Pickering on one (the shareholder report) and Arnold & Porter on the other (the 8K report) (A 173,175-176). Entwisle testified that the reports' conclusions were based upon the defendant's own self serving statements to him (A 180).

ARGUMENT

I. THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION

a. Even Assuming Arguendo A Belief That Disclosure Was Unnecessary If An Account Reflected Less Than $20,000 At The End Of A Fiscal Year, The Defendant Was Still Acting In Bad Faith Because His Transactions Did Not Really Reduce His Loans Below That Figure.

The defendant contends that the government's evidence was insufficient to support his conviction.[13/] Underlying this argument is the suggestion that he believed a reduction of his AVM loans below $20,000 by the end of 1970 would constitute full compliance with all the relevant S.E.C. regulations. This notion, it is claimed, was induced through a good faith reliance upon advice of AVM's counsel and accountants. (See, e.g., Br. at 24, 26). As our statement reveals, and our argument will elaborate upon, the evidence demonstrated that the defendant did know of the actual provisions of the S.E.C. regulations and he in no way can be characterized as having placed good faith reliance upon counsel or accountants. But even assuming arguendo a belief that a debt reduced below $20,000 by year's end constituted compliance, it is patent that the defendant's financial machinations at the end of 1970 did not constitute any good faith effort to comply even with that interpretation of the regulations.

13/ The test for determining the evidentiary validity of a jury's verdict is, of course, whether the evidence adduced at trial, taking the view most favorable to the government, is sufficient to support the verdict. Glasser v. United States, 315 U.S. 60, 80 (1941); United States v. Koss, 506 F.2d 1103, 1106 (2nd Cir. 1974) cert. den. ____ U.S. ____; United States v. Arroyo, 494 F.2d 1316, 1317 (2nd Cir.1974); United States v. McCarthy, 473 F.2d 300 (2nd Cir. 1972), United States v. Cohen, slip op. doc. No. 742026 (decided June 26, 1975) p. 4419.

The defendant's year end transactions in regard to his AVM accounts in fact consisted of efforts directed solely towards making it inaccurately appear that he owed less than $20,000 by the end of that year. As our Statement reveals, he actually owed considerably more. By the confirmation statement signed on November 30, 1970, the defendant acknowledged that he owed the full $67,868 then reflected in his two accounts, and his father affirmed that he owed a $10,000 sum (Government Exhibit 79, A 40-41). Yet, only a few days later, the defendant ordered Lewis to charge $9,000 of this debt to his father's account. Thus, the defendant's debt to AVM at year's end, as he certainly knew, in reality was at least $28,100 (i.e., the $19,100 actually reflected plus this $9,000 falsely transferred). Nor can the repayments of $30,000 and $5,000 on December 28 (the latter facilitated by Lewis taking a $5,000 advance, cashing it, and placing the cash in the defendant's account) be considered genuine good faith reductions of his indebtedness; it is apparent that the defendant intended only to make it appear that he had reduced his debt by this amount, for immediately after the end of the year he reobtained the $35,000 from the company. Thus, given the defendant's intent when the December 28 "repayments" transpired, his actual indebtedness to AVM by the end of 1970 should realistically be seen as at least $53,100 ($19,100 + $9,000 + $35,000) for the legal recognition of such paper transfers as the defendant affected at the end of 1970 would obviously defeat the underlying purpose of and render impotent the S.E.C.'s disclosure regulations.

b. The Evidence Showed That The Defendant Knew Of The S.E.C. Regulations And That He Intentionally Violated Them.

In any event, there is no merit to the defendant's argument that the government failed to prove his knowledge of the S.E.C. regulations and his intent to violate them, in part through use of the mails, for this was clearly demonstrated by the prosecution's evidence as were all other necessary elements of the offenses charged.

When the defendant and Lewis considered the former's outstanding debt,"we felt we would rather not have it on the proxy statement" (A 119). It was demonstrated that defendant, as President of AVM, was fully cognizant of the relevant S.E.C. regulations. AVM's counsel, Entwisle, discussed these S.E.C. regulations with both the defendant and Lewis when the corporation first went public (A 135-136). In addition, the defendant attended two separate conferences on the subject of S.E.C. regulations after AVM became a public company, at which time verbatim copies of the regulations were handed out (A 136-139). Lewis was also told by AVM Vice-President Lyons that the S.E.C. regulations as to 10K reports mandated disclosure if loans exceeded $20,000 at any time during the pertinent fiscal year, and this information was passed on to the defendant (A 115-116, 113). Finally, Entwisle testified that in accord with the procedures established in 1964, the defendant was expected, in his review of Entiwsle's first proxy statement draft, to ". . . give back to me full disclosure based on the rules: which Entiwsle had discussed with him (A 137-138).[14/]

14/ The defendant attempts to suggest that when he and Entwisle were in a Washington law office in August of 1972, he was shown a copy of the
(footnote continued on next page)

Indeed, the defendant's argument on this point requires of the court two implausible assumptions. First, although he had been frequently informed that thre was both a $10,000 regulation and a $20,000 regulation for proxy statements and 10K statements respectively, the defendant purports to characterize himself as having been aware only of a single $20,000 rule (Br. p. 26-27). Secondly, acknowledging awareness of at least a $20,000 rule, he asserts a belief that it applied only if the loans at issue were outstanding at the end of the relevant fiscal year. The jury was unpersuaded by this implausible theory of defense. The applicable regulation, 17 C.F.R. 210.5-04, is wholly unambiguous in its requirement that an officer's loans be reported in a Schedule II if they exceeded $20,000 at any time during the prior fiscal year:

> The schedule . . . shall be filed with respect to each person among the directors, officers, and principal holders of equity securities other than affiliates, from whom an aggregate indebtedness of more than $20,000 or 1 percent of total assets, whichever is less, is owed, or at any time during the period for which related profit and loss statements are filed, was owed. (emphasis added) 15/

Since the evidence at trial established that the defendant was on several occasions apprised of the pertinent regulations, the jury was entitled to conclude that his failure to observe these disclosure requirements was calculated and not due to an inadvertent mistake.

14/ (Continued from page) S.E.C. regulations and stated that he had never heard of them before (Br. p. 17-18). In fact, the defendant's counsel created that scenario on cross-examination of Entwisle and asked him if that had happened. Entwisle did not recall any such incident (A. 170-171).

15/ Similarly, 17 C.F.R. 240.14a-101 (Item 7e), providing reporting requirements on proxy statements, explicitly stipulates that:

> This paragraph does not apply to any person whose aggregate indebtedness did not exceed $10,000 or 1 percent of the issuer's total assets, whichever is less, at any time during the period specified.

c. The Trial Court's Instruction Concerning Reliance Upon Expert Advice Was Correct And There Was No Evidence That The Defendant's Acts Were Induced By Adherence To Inaccurate Expert Advice.

1. The instruction was correct.

Pursuant to his defense that he did not intentionally violate the securities or mail fraud laws, the defendant avers that he justifiably relied upon the advice of counsel and accountants. Good faith reliance upon expert advice, particularly of legal counsel, is, of course, relevant to criminal intent (see Bisno v. United States, 299 F.2d 711 (9th Cir. 1961). certiorari denied, 370 U.S. 952). However, there is no merit to the defendant's contention that his proffered instruction on reliance,[16] rather than that actually delivered by the court,[17] should have been accepted.

16/ The defendant requested the following instruction:

> "'To impute to the corporate officer the mistakes of his consultants would be to penalize him for consulting an expert, for if he must take the benefit of his counsel's or accountant's advice cum onere, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than that exacted from a layman.' [Thus, Lloyd Dixon had no duty to ask either, of his accountant or lawyer, whether or not these loans should be reported to the shareholders or the Securities and Exchange Commission.] (Defendant's Request No. 8, marked as court exhibit; quoted portions taken directly from the Haywood Lumber case, 178 F.2d at 771)." (Br. p. 38)

17/ The Trial Court instructed the jury as follows on this question:

> "In this case the defendant claims that he is not guilty of knowing and willful wrongdoing because he acted on the basis of advice from his attorney and accountants. If the defendant sought advice of attorneys and accountants whom he considered competent and under the circumstances a reasonable person would find that they were competent and before he took any action he made a full and active report to them of all the material facts of which he reasonably should have had knowledge and he acted in good faith for the purpose of securing advice on the lawfulness of his conduct and he acted strictly in accordance with the advice received from the attorney

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The instruction proferred by the defendant contains no requirement that he have acted in good faith in enlisting expert advice, nor does it require that he have provided his experts with all reasonably relevant information upon which they could render intelligent judgment. It in essence constitutes an "ostrich test" by which criminal defendants might insulate themselves from penal liability through the simple expedient of concealing from purported advisers necessary information.

The instruction adopted by the trial court below, on the other hand, reasonably inquires as to whether the claimant ". . . acted in good faith for the purpose of securing advice . . ," and requires that there have been ". . . a full and active report to them [the experts] of all the material facts of which he should reasonably have had knowledge. . ."

This instruction comports with the reliance test accepted in the federal courts. See 1 Fed. Jury Practice and Instructions Sec. 16.15 at 314 (2 Ed., 1970). It is in accord with the test originally promulgated by

17/ (Continued from previous page) or from the accountant which was given to him following this report, then the defendant would not be willfully doing wrong in some action he took or some action that he failed to take which the law required to be done. Whether the defendant acted in good faith, whether he gave his attorneys or his accountants all of the information he should have given them under the circumstances, whether he made a complete and full report to them of the information he should have made available and whether he acted in accordance with the advice received are questions for you to determine." (Tr. 311-312)

the Supreme Court[18/] and has been accepted by this court.

In United States v. Colasurdo, 453 F.2d 585, 594 (2nd Cir. 1971), certiorari denied, 406 U.S. 917, also a prosecution for conspiracy, mail fraud, and inadequate 10K filings, this court observed the following as to a claim of reliance upon the advice of accountants:

> But the question is ultimately one of honesty and good faith. [Citation omitted.] And while reliance upon accountants' advice might be 'highly persuasive,' although not conclusive, [Citation omitted] misleading accountants so as to cause them to omit material they would otherwise include is a strong indication of the falsity and misleading nature of the filing actually made.

See also United States v. Finance Committee to Re-Elect the President, 507 F.2d 1194, 1198 (D.C. Cir. 1974); United States v. Cates, 467 F.2d 129, 132 (3rd Cir. 1972), certiorari denied, 410 U.S. 909; Note, "Reliance on Advice of Counsel." 70 Yale Laws 978 (1961).

The trial court's instruction does not, as the defendant characterizes it (Br. p. 43), require that the defendant inquire of his accountants or counsel as to the applicability of specific disclosure rules. Rather, it merely requires that he provide them with the basic information and raw data

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18/ In Williamson v. United States, 207 U.S. 425, 453, involving a prosecution for conspiracy to suborn perjury, the Court approved the following instruction on reliance as negating the element of intent:

> . . . If a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of loaning money to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves willful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.

which under the circumstances he reasonably should provide in order to insure competent advice.

Haywood Lumber & Min. Co. v. Commissioner of Int. Rev., 178 F.2d 769 (2nd Cir. 1950), the purported predicate for the defendant's own reliance instruction, does not support his position. In Haywood, which involved civil penalty tax matter, the issue was whether a corporate taxpayer's failure to file personal holding company returns was due to reasonable cause or willful neglect. The taxpayer's accountant in that case had failed to file, though he knew the taxpayer was a personal holding company, "through inadvertance" (Id. at 770). As to the taxpayer, this court concluded that his failure was due to reasonable cause as he had in good faith sought expert advice and had". . .disclosed to . . .[the accountant] all necessary information about the corporation . . ." (Id. at 770). The taxpayer in Haywood was not required, as the defendant notes (Br. at 43), to inquire regarding a specific tax regulation, just as the trial court below imposed no such requirement upon the defendant. However, this court emphasized in Haywood, in the sentence immediately prior to that quoted by the defendant (Br. at43), that a good faith disclosure of all reasonably relevant information was necessary before one may enjoy the mitigating effects of reliance upon an expert:

> When a corporate taxpayer selects a competent tax expert, supplies him with all necessary information, and requests him to prepare proper tax returns, we think the taxpayer has done all that ordinary business care and prudence can reasonably demand (id. at 771). (emphasis added)

2. The evidence clearly showed that the defendant's acts were not based on a good faith reliance upon his counsel or accountants.

The jury below was wholly correct in rejecting the reliance defense as delineated by the trial court's instruction, for it was apparent from the evidence that the defendant did not make a good faith effort at securing expert assistance through providing a full disclosure of relevant information to the experts involved.

Under AVM's established procedures, the counsel Entwisle prepared the first draft of the proxy statement which was the subject of the first five counts of the indictment. As Entwisle testified, the defendant, amongst others, was expected then to provide "full disclosure based on the rule" (A 138) as to relevant information known by him, such as the nature of his financial obligations to the corporation. Although it was established that the defendant had personally reviewed Entwisle's draft of the proxy statement (Government Exhibit 77), he provided his counsel with no indication whatsoever of his loan transactions with the company. Such information would have put Entwisle as counsel on notice as to the possible applicability of the S.E.C. disclosure regulations.[19]

19/ The defendant attempts to avoid this argument by suggesting Entwisle had constructive knowledge of the loans because, as corporate counsel, he had access to AVM's books. As our Statement indicates, however, Entwisle, under the established procedures of AVM, relied upon corporate officers to provide him with information such as personal loans from the corporation (A 136-140) and thus he did not, until Lewis's grand jury testimony, personally seek to examine the company's books (A 142-143).

Nor did the evidence support the defendant's claim (Br. at 1, 45) that he did not report his loans on the annual 10K report (the subject of count six of the indictment), in reliance upon AVM's auditors, Ernst & Ernst, or Entwisle. Entwisle prepared the narrative portion of the report and he, as discussed above, was not informed as to the loans. As to the accounting firm, the defendant after he was indicted, told Entwisle that "he had had no professional advice on the matter from Ernst and Ernst . . ." and claimed that Lewis or Lyons had misled him (A 156). Nor was there credible evidence to show that the accounting firm was made aware of the loans. The defendant cites the fact that in Lewis's testimony he indicated that one Sam Hale, an Ernst accountant who dealt with AVM in 1964-1967, had indicated sometime in 1967 that the Schedule II requirement was a "year end" rule. However, as we discuss in the Statement, Lewis was later told by Jack Lyons, Executive Vice President and Director of Finance for AVM, that the rule was not merely a year end requirement but applied if loans had at any time during the year exceeded $20,000. Aside from this one statement by an accountant to Lewis in 1967,

no other evidence at trial revealed any incorrect advice emanating from Ernst & Ernst.[20/] Under all the circumstances, jury was clearly entitled to reject a defense of good faith reliance upon expert advice.

20/ As to the defendant's assertion that Ernst & Ernst knew about his loans, the only evidence as to this was the confirmation statement signed by the defendant on November 30, 1970, acknowledging his then current debt of $67,868 (Government Exhibit 79). However, the defendant's co-conspirator, Lewis, testified that he always acted as an intermediary for Ernst in bringing this confirmation to the defendant (A 114) and thus, while Lewis was accordingly apprised of the need to cover up the defendant's debt, there was no indication that the accounting firm received the information contained in the confirmation statement. The matter is in any event immaterial as there

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d. The Other Elements Of The Mail Fraud Charges Were Proven At Trial.

Besides denying a purposeful scheme to violate the securities and mail fraud laws, the defendant argues that his mail fraud convictions (counts three, four and five) are invlaid because there was no evidence of actual harm in that no stockholder was shown to have been specifically misled in executing his or her proxy (Br. at 27). The specific demonstration of such actual harm accruing through a defendant's fraudulent acts, however, does not constitute an element of mail fraud under 18 U.S.C. 1341, although as we will discuss below, actual harm was caused by the defendant.

Contrary to the defendant's analysis (Br. at 25), the law of this Circuit is that the offense of mail fraud entails but two elements, (1) use of the mails and (2) a scheme to defraud. See United States v. Regent Office Supply Co., 421 F.2d 1174 (2nd Cir. 1970).[21] It is not necessary to prove that the fraudulent scheme succeeded, as the court emphasized in Regent, supra, at 1180):

20/ (Continued from previous page) was no evidence - indeed there is no contention - that upon receipt of this information in 1970, a representative of the firm misled the defendant regarding disclosure requirements with respect to these loans - requirements the defendant had otherwise been appraised of. Moreover, there is no evidence whatever that the defendant at any time sought the advice of the corporation's accountants in this regard.

21/ See also Pereira v. United States, 347 U.S. 1, 8 (1953); United States v. Goldberg, 455 F.2d 479, 480 (9th Cir. 1972); United States v. Mackay, 491 F.2d 616, 619 (10th Cir. 1973).

> Since only a 'scheme to defraud' and not actual fraud is required for conviction, we have said that 'it is not essential that the Government allege or prove that purchasers were in fact defrauded.' [22/] (citing United States v. Andreadis, 336 F.2d 423, 431(2nd Cir. 1966))

All that the government must demonstrate, the Regent decision held, is that "some actual harm or injury was contemplated by the schemer." Id. at 1180 (emphasis in original).

It is clear, however, that both the defendant and Lewis contemplated and created an actual harm through their scheme, that is, depriving AVM's stockholders of important financial information to which they were lawfully entitled under S.E.C. regulations.[23/] As Lewis testified, "We felt we would rather not have it [the loan information] on the proxy statement" (A 119). This fraudulent purpose was effectively achieved by the intentional omissions on the statements.[24/]

22/ Accord, Fineberg v. United States, 393 F.2d 417, 419 (9th Cir. 1968); New England Enterprises, Inc. v. United States, 400 F.2d 58, 72 (and cases cited), (1st Cir. 1968), certiorari denied, 393 U.S. 1036; United States v. Reina, 446 F.2d 16, 17-18 (9th Cir. 1971); United States v. Gaskill, 491 F.2d 981, 984, n. 5 (8th Cir. 1974); Blanchly v. United States, 380 F.2d 665, 673 (5th Cir. 1967); United States v. Reicin, 497 F.2d 563, 571 (7th Cir. 1974), certiorari denied, 419 U.S. 966.

23/ The underlying purpose of Section 1341 is not to protect against one or more specific types of fraud, but rather to insure the basic integrity of the postal system. See Parr v. United States, 363 U.S. 370, 389 (1959); United States v. Cashin, 281 F.2d 669, 674 (2nd Cir. 1960); Gouled v. United States, 273 F. 506, 508 (2nd Cir. 1921). Thus, the object of a scheme to defraud under Section 1341 need not necessarily be directed towards the obtaining of money or other tangible property, but may, as in this case, entail less tangible rights and privileges. See United States v. States, 488 F. 2d 761 (8th Cir. 1973), certiorari denied, 917 U.S. 909, 950 (schemes to register nonexistent persons as absentee voters held cognizable under Section 1341 as defrauding public and opposing candidates of accurate tally of voter sentiment; United States v. George, 477 F. 2d 508 (7th Cir. 1973), certiorari denied, 414 U.S. 827, (defrauding company of employee's honest and faithful services).

There is thus no substance to the defendant's attempt to avoid culpability for his mail fraud violations by relying upon the difference between active and constructive fraud, the former being necessary to support a mail fraud charge. As the defendant acknowledges, citing Post v. United States, 407 F.2d 319 (D.C. Cir. 1968), certiorari denied, 393 U.S. 1092, active fraud entails a ". . . specific intent to defraud . . ." (id. at 329) or "conscious knowing intent to defraud" (United States v. Kyle, 257 F.2d 559, 564 (2nd Cir. 1958)) and not merely a negligent breach of fiduciary duty,

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23/ (Continued from previous page) civilly actionable regardless of fraudulent intent. In this case the evidence clearly showed a fraudulent purpose in the defendant's intentional omission of relevant information required by the S.E.C. Epstein v. United States, 174 F.2d 754 (6th Cir. 1949), cited by the defendant as epitomizing constructive fraud, is inapplicable to the circumstances of this case. In Epstein, several directors of a brewery enjoyed interests in other companies which made sales to the brewery, though the sales were shown to have been made at normal market prices (Id. at 760-761). While the court recognized this as a possible breach of fiduciary duty, the absence of any pecuinary loss to the company negated a suggestion of intentional fraud (Id. at 766-768). In the defendant's case, by contrast, the shareholders did suffer a loss, namely access to specific information to which they were entitled under law.

24/ Given the calculated concert of action between the defendant and Lewis, the former's denial of a conspiracy between them requires no extensive comment here. The defendant alludes to a point in Lewis' testimony when defendant's counsel asked Lewis if he had conspired to violate the law and Lewis responded in the negative (Br. at 33). This conclusion was for the jury to make and Lewis' self-serving statement is of no relevance considering the ample evidence of the scheme between himself and the defendant which was disclosed in large part through his own testimony on direct examination.

II. IT WAS PROPER FOR THE TRIAL COURT TO INSTRUCT THE JURY THAT IT COULD CONSIDER THE DEFENDANT'S POSITION AS PRESIDENT OF AVM IN DETERMINING WHETHER HE HAD THE KNOWLEDGE OF THE SEC REGULATIONS IMPOSING UPON HIM THE OBLIGATION TO DISCLOSE HIS PERSONAL INDEBTEDNESS TO THE CORPORATION

The defendant also argues that the trial court's instruction that the jury could consider his position as president of AVM in determining whether he had knowledge of the pertinent SEC regulations imposed upon him a "higher duty of conduct" (Br. at 54) and allegedly undermined the requirements of "presumption of innocence, proof beyond a reasonable doubt, criminal intent, and knowledge." (Br. at 55)

An assessment of these instructions confutes this contention. The statements of the trial judge[25/] alluding to the defendant's position were in reference to his defense that he had not intentionally omitted the loan information from the reports and had in good faith relied upon the advice of experts. The instructions did no more than to state the obvious, namely, that in assessing whether the defendant was really ignorant of the rules, they could consider his position and whether it was likely that one in such a position would be unaware of the federal regulations which governed his company's operations and particularly delineated his personal obligations as an officer of the corporation. Specifically, the court instructed that:

> To determine whether or not under all of the circumstances the defendant acted willfully and knowingly, you should consider carefully

25/ Those statements of the prosecuting attorney attributed to his summation (Br. p. 54) were made during arguments before the court, not in the presence of the jury.

> all of his conduct under the circumstances; the activities of others; his experience in corporate affairs; the duties and responsibilities placed upon him by being president of a corporation such as the AVM Corporation. (Tr. 312)
>
> Intent and knowledge may be inferred from a defendant's conduct, his acts, his statements and all of the surrounding circumstances. As I have already said to you, you may take into account his educational background, his experience in financial affairs, the extent of his participation in corporate transactions. (Tr. 313)
>
> You are entitled to consider his responsibilities and duties as president of a corporation such as the AVM Corporation which he is bound to know is subject to certain rules and regulations of the SEC. (Tr. 315)
>
> As I have already charged you, that more is expected and required of a president of a corporation in the way of reasonable investigation than can be reasonably expected of a lesser official. (Tr. 326-27)

The latter portion of this instruction simply apprised the jury that it was reasonable to expect of a corporate president an awareness commensurate with his responsibilities. This, taken together with the preceeding instructions, did no more than instruct the jury to use their common sense in resolving the factual issues presented them. By analogy, no one could deny that a jury would consider a police officer's familiarity with arrest procedures in assessing his claim of good faith to a false arrest charge; or a hunter's background in weaponry where the claim is accidental death. In circumstances such as these, an individual's background and position are logical factors to consider in determining

whether he possessed a certain knowledge and the court did no more than to inform the jury that they might examine these factors.[26]

These instructions were, therefore, appropriate. Moreover, we would note that the trial court emphasized to the jury that the defendant was presumed innocent and that the government shouldered the burden of proving him guilty beyond a reasonable doubt.

> [I]t is most important that right from the beginning you keep in mind that the defendant is presumed innocent of the charge placed against him. . . .that before you can vote a verdict of guilty, they must or you must be convinced of the defendant's guilt beyond a reasonable doubt. (Tr. 284)

This admonition was thoroughly and frequently repeated during the judge's instructions (See Tr. 285, 293, 294, 295, 296).[27]

26/ The trial court is, of course, permitted to comment upon the evidence United States v. Tourine, 428 F.2d 865, 869 (2nd Cir. 1970), cert. den., 400 U.S. 1020 and such comments as made above regarding the credibility of a defense are, we submit, permissibly neutral in comparison to comments to the effect that a defendant's special interest in the case must be considered in assessing the veracity of his testimony. Such does not undermine the presumption of innocence or reasonable doubt standard, but merely calls to the jury's attention logical and pertinent considerations. See United States v. Tyers, 487 F.2d 828, 831 (2nd Cir. 1973); United States v. Scalifani, 487 F.2d 245 257 (2nd Cir. 1973); United States v. Mahler, 363 F.2d 673, 678 (2nd Cir. 1963); United States v. Sullivan, 329 F.2d 755 (2nd Cir. 1964), cert. den., 377 U.S. 1005).

27/ In any event, it is reasonable to conclude on these facts that if error were perceived in the court's charge, such was harmless beyond a reasonable doubt. The evidentiary basis for the defendant's asserted good faith reliance upon expert advice — secondhand information from an accountant in 1967, information which may not in fact have even been conveyed to the defendant — was meager indeed. In contrast, there was overwhelming evidence indicating the defendant's awareness of the disclosure requirements. Moreover, the defendant's activities — a fraudulent transfer of personal indebtedness to his father's account and other paper transactions calculated solely to conceal his personal indebtedness — were the antithesis of good faith. Under such circumstances, it is plain that the jury's verdict is attributiable to the evidence, not an allegedly erroneous charge by the court.

III. THE INDICTMENT VALIDLY CHARGED BOTH SECURITY LAW AND MAIL FRAUD VIOLATIONS

Count II of the indictment charged that the defendant had solicited by mail proxies which failed to disclose the information required by 15 U.S.C. 78n and 17 C.F.R. 240.14a-3 and 240.14a-101, (Item 7e). Counts III, IV, and V, charged that having devised a scheme to defraud AVM shareholders of the information listed in the above sections, the defendant had taken from the mails falsely solicited proxies sent by certain shareholders, in violation of 18 U.S.C. 1341. The defendant contends that the indictment unlawfully charged both securities law and mail fraud violations arising from the same basic transaction. Mail fraud and securities law violations are frequently joined in a single indictment.[28/] An analysis of the considerations dictating when a single transaction may be separately punished under distinct penal provisions does not implicate this practice.

In arguing that the securities law and mail fraud counts were multiplicitous, the defendant characterizes the appropriate test for multiplicity as whether the same evidence is required to prove each offense. Actually, the proper test is whether each offense requires proof of a different fact.

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only

28/ See United States v. Benjamin, 328 F.2d 854 (2nd Cir., 1964) United States v. Ashdown, 509 F.2d 793 (5th Cir., 1975); Sanders v. United States, 415 F.2d 621 (5th Cir., 1969).

> one, is whether each provision requires proof of a fact which the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932).

See also Gore v. United States, 357 U.S. 386; United States v. Leibowitz, 420 F.2d 39, 42-43 (2nd Cir., 1969). In applying this test, this court has observed "...that it is the violation, as distinguished from the direct evidence offered to prove that violation which must be different..." (emphasis in original) United States v. Leibowitz, supra, 420 F.2d at 43 (emphasis in original). See also Harris v. United States, 359 U.S. 19, 23-24; Iannelli v. United States 420 U.S. 770, 785, n. 17 (1975) ("...the Court's application of the test focuses on the statutory elements of the offense.")

Under this analysis, the defendant's activities with respect to proxy statements constituted violations of both 15 U.S.C. 78n (and attendant regulations) and 18 U.S.C. 1341; as such, he could properly be separately charged, convicted, and punished under both statutes. As we have discussed previously, in order to convict for a violation of Section 1341, two elements must be established: (1) a scheme to defraud, and (2) use of the mails "...for the purpose of executing such scheme or artifice." Under Section 78n, three elements must be established: (1) the solicitation of a proxy, (2) use of the mails or other means of interstate commerce in connection therewith, and (3) a violation of SEC rules, in this case, failure to disclose loans aggregating more than $10,000 to a corporate officer exceeding $10,000 during the past fiscal year.

Thus, Sections 78n and 1341 each require proof of a fact which the other does not. Section 78n mandates proof that a proxy statement was solicited and proof that the solicitation did not include disclosure of certain loan

information. Section 1341, on the other hand, requires proof of a scheme to defraud.[29/] Thus, the defendant was validly charged with having violated both the mail fraud statute and the security laws.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of convictions should be affirmed.

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29/ As to the three mail fraud counts each separate use of the mails, although pursuant to a single scheme, constitutes a separate offense. Badders v. United States, 240 U.S. 391 (1916); Sanders v. United States, 415 F.2d 621, 626 (5th Cir., 1969) cert. den., 397 U.S. 976; United States v. Palmer, 229 F.2d 861, 867 (10th Cir., 1955); United States v. Joyce, 499 F.2d 9, 18 (7th Cir., 1974) cert. den., U.S. ; cf. United States v. Alaimo, 297 F.2d 604 606 n. 4 (3rd Cir., 1961); United States v. Ashdown, 509 F.2d 793, 800 (5th Cir., 1975).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief for Appellee have this day been mailed to counsel for Appellant at the following address:

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